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No. 79-1949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHESTER KAIN,

Petitioner,

versus

S.S. VJAZMA

and

THE BALTIC SHIPPING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Did the District Court and the Court of Appeals apply the correct standard of law in determining that there was no basis for the trial Judge to recuse himself?

2. Was there any factual basis for the trial Judge to recuse himself?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Statutes Involved

Involved in this case is 28 U.S.C. § 455(a), which is printed in the body of Respondent's brief.

Statement of the Case

This suit for injuries to a longshoreman, Chester Kain, during the loading of grain on a vessel, the VJAZMA, posed a single, simple issue of fact: was it a crewmember or was it the winchman of the stevedores in charge of the loading operation who negligently moved a boom causing

a chain (preventor) to swing and push plaintiff into the hold?

The Judge originally scheduled to try this case had two cases ready for trial on the same day, and as is customary under such circumstances, asked another Judge (Charles Schwartz, Jr.) to take one of the cases. (Respondent's Appendix, p. 2a).

The case was tried by consent to the Court without a jury. Plaintiff and three fellow longshoremen, including the winchman, testified in open Court. The Judge found their testimony unworthy of belief, and ruled in favor of defendant shipowner.

Plaintiff's counsel then for the first time accused the trial Judge of bias, and sought a new trial, stating the Judge should have recused himself on the basis that he was biased. The alleged bases on which the argument of bias was premised were:

1. The Judge sharply questioned plaintiff's witnesses during the trial, and

2. The son of defense counsel had been an associate in the Judge's law office while the Judge was in private practice.

District Court Judge Blake West, to whom these issues were referred, aptly termed the motion "spurious," stating succinctly:

> "Movant's affidavit sets forth no facts to support an assertion that the judge's impartiality might reasonably be questioned, and the Court holds that there was in fact no reasonable basis for questioning the trial judge's impartiality. As stated, the judge, with good

> reason, based his decision largely upon the lack of 'credibility of plaintiff and plaintiff's witnesses.' "

(Petition Appendix, p. A-13).

The United States Court of Appeals for the Fifth Circuit heard oral argument, "carefully considered the briefs, records, findings of fact and conclusions of law" and agreed there was no merit in the motion to recuse, and affirmed the decisions below. (Petition Appendix, p. A-14).

Summary of Argument in Opposition to the Petition of Chester Kain for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Respondent respectfully requests that this Court deny the petition for writ of certiorari to review the judgment entered February 12, 1980 in the United States Court of Appeals for the Fifth Circuit affirming the Order of Judge Blake West dated June 22, 1977, and denying a petition for rehearing entered on March 13, 1980.

There is simply no issue of law before this Court. The District Court and the Court of Appeals both applied the correct legal standards under 28 U.S.C. § 455(a). Petitioner is therefore asking this court to find bias and prejudice on the facts of the case and to overrule the factual findings of the two Courts below.

Even if it were appropriate for this Court to review the findings of the two Courts below, the record contains no fact or suggestion of a fact which would provide a basis for the Judge to recuse himself. Petitioner's attempt to manufacture bias from the fact that the Judge questioned petitioner's witnesses during the trial to test their credibility provides no ground for the appearance of bias.

REASONS FOR DENYING THE WRIT

POINT I

There Is Simply No Point of Law Before This Court. The District Court and the Court of Appeals Both Applied the Correct Legal Standards. Petitioner Is Therefore Asking This Court to Find Bias and Prejudice on the Facts of the Case, and to Overrule the Factual Findings of the District Court and the United States Court of Appeals for the Fifth Circuit.

The statutory standard for disqualification of a Federal Judge is 28 U.S.C. § 455. *Davis* v. *Bd. of School Commissions,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976). Subsection 455(a), which petitioner asserts required Judge Schwartz to recuse himself from the *Kain* case, was amended in 1974 to adopt the language of Canon 3-C of the ABA's Canons of Judicial Conduct. Subsection 455(a) now provides:

> "Any justice, judge, magistrate or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

In discussing the amendment, the House Judiciary Committee commented:

> "Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which 'his impartiality might reasonably be questioned.' This sets up an objective standard rather than the subjective standard set forth in the existing statute. . . . This general standard is designed to promote confidence in

> the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself . . ."

H.R. Rep. No. 93-1453, 93rd Cong., 1st Sess. 2 (1974), 1974 U.S. Code Cong. & Admin. News pp. 6351, 6355.

Thus, the language of 455(a) regarding impartiality that "might reasonably be questioned," establishes an objective, reasonable factual basis standard by which to insure impartiality. *See* Note, *Disqualification of Judges & Justices in the Federal Courts,* 86 Harv. L. Rev. 736 (1973). Petitioner is therefore correct in asserting that this is the standard Federal Courts have applied. (Petition, p. 13). The Fifth Circuit has consistently applied it. *Potashnick* v. *Port City Construction Company,* 609 F.2d 1101 (5th Cir. 1980); *Fredonia Broadcasting Corp., Inc.* v. *RCA Corp.,* 569 F.2d 251 (5th Cir. 1978), *cert. denied,* 439 U.S. 859 (1979); *U.S. ex rel. Weinberger* v. *Equifax Inc.,* 557 F.2d 456 (5th Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978); *Parrish* v. *Bd. of Commissioners,* 524 F.2d 98 (5th Cir. 1975), (*en banc*), *cert. denied,* 425 U.S. 944 (1976); *Davis* v. *Bd. of School Commissioners,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976). And the other Circuits that have reached the question are in unison. *See, e.g., Blizard* v. *Frechette,* 601 F.2d 1217 (1st Cir. 1979); *U.S.* v. *Carignan,* 600 F.2d 762 (9th Cir. 1979); *S.J. Groves & Sons* v. *Int'l Brotherhood of Teamsters,* 581 F.2d 1241 (7th Cir. 1978); *U.S.* v. *Haldeman,* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977).

Petitioner fails to recognize however, it is precisely this reasonable basis standard that both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit

applied in the *Kain* case. The language of Judge West's Order denying petitioner's motion for recusal is the very language of 455(a) that established the reasonableness standard. In dismissing petitioner's 455(a) claim Judge West said:

> "Movant's affidavit sets forth no facts to support an assertion that the judge's impartiality *might reasonably be questioned,* and the Court held that there was in fact *no reasonable basis* for questioning the trial judge's impartiality."

(Petition Appendix, p. A-13) (emphasis added). The Fifth Circuit, in their affirmance, specifically agreed with Judge West's Order. (Petition Appendix, p. A-14).

There is therefore simply no point of law before this Court. The lower Court's decision in the *Kain* case applied subsection 455(a) in accordance with other decisions of the Fifth Circuit and additional Circuits. In asking this Court to grant certiorari, the petitioner, in effect, is asking the Court to find bias and prejudice on the facts of the case, overruling the factual findings of Judge West and the Fifth Circuit's affirmance of those findings.

POINT II

The Record Contains No Fact or Suggestion of a Fact Which Would Provide a Basis for the Judge to Recuse Himself.

Not only is no question of law presented by this case, but also both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit properly applied the facts of this case to the correct standard of law, for the facts present a less meritorious claim for bias and prejudice than other cases that have denied such a claim.

Petitioner's primary assertion to justify recusal is that Judge Schwartz, prior to his appointment to the bench, had been a partner in the firm of which William E. Wright, Jr., the son of defense attorney William E. Wright, had been an associate. (Petition, pp. 5-7). Petitioner suggests that this situation gave rise to a bias for Mr. Wright and thus for his client, and denied petitioner an impartial trial. But as Judge Schwartz himself stated:

> "I hired Mr. William E. Wright, Jr. without having to ever consult or having a conversation with Mr. William Wright, Sr. I have never had a social engagement, a social relationship, or any kind of relationship with Mr. William Wright, Sr. during the entire time that I have practiced law. I think I am correct, I don't know if he was in my law class, but we were in law school at the same time. I have never had a case in which I have been associated with Mr. William Wright, Sr., nor do I ever recall having a case in contest with Mr. Wright, Sr. in some thirty years before this Bar. So, as to the allegations and the reference that there may have been some rela-

> tionship between Mr. William Wright, Sr. and this Court they are utterly false and without merit."
>
> (Respondent's Appendix, pp. 2a-3a)

A review of the cases holding for recusal shows that the facts in the present case clearly do not present the type of relationship between an attorney and Judge that has been found to give rise to bias and prejudice.

Judge Schwartz's relationship with Mr. Wright, Sr. or his law firm was not one of attorney-client. *Smith* v. *Sikorsky Aircraft,* 420 F. Supp. 661 (C.D. Cal. 1976) (plaintiff's law firm was associated with an attorney who had acted as counsel for the Judge). Nor did Judge Schwartz have any business dealings with Mr. Wright, Sr. or with any member of his firm. *Potashnik* v. *Port City Construction Co.,* 669 F.2d 1101 (5th Cir. 1980) (attorney for one party and Judge joint investors in real estate). Nor did Judge Schwartz or any member of his family or of his former law firm have even the possibility of a pecuniary interest in this case. *Id.* (Judge's father partner in law firm representing a party; father held to have potential to be financially affected by the outcome of case).

Finally, Mr. Wright was not Judge Schwartz's former law clerk, and he did not previously work on the case in that capacity. *Fredonia Broadcasting Corp., Inc.* v. *RCA Corp.,* 569 F.2d 251 (5th Cir. 1978), *cert. denied,* 439 U.S. 859 (1979). (Judge's former law clerk actively participated as plaintiff's counsel's associate for retrial of case he worked on as clerk).

More importantly, the facts of *Kain* present a lesser potential for the appearance of bias than attorney-Judge relationships that the Fifth Circuit has held do not justify recusal. In *United States ex rel. Weinberger* v. *Equifax Inc.,* 557 F.2d 456 (5th Cir. 1977), *cert. denied,* 434 U.S.

1035 (1978), a District Court Judge's son was an associate of the law firm representing the defendant, and the Court decided against disqualification. Certainly the fact that the Judge's son worked in the firm of defendant's counsel presents a greater potential for bias towards that defendant than the facts do in the case at hand, where there was no relative of Judge Schwartz with the law firm of defendant's counsel.

In *Smith* v. *Pepsico,* 434 F. Supp. 524 (S.D. Fla. 1977), the Court held that the fact that the plaintiff's attorney was a law clerk for a Judge for two years was not a basis on which to question the Judge's impartiality. (attorney had no involvement with case while clerk). Certainly the close relationship between a Judge and law clerk, *see Fredonia Broadcasting Corp., Inc.* v. *RCA Corp.,* 569 F.2d 551 (5th Cir. 1978), *cert. denied,* 439 U.S. 1035 (1979), suggests a greater potential for bias towards a party that clerk may represent than does the relationship between a Judge and the father of an associate in the Judge's former law firm.

Thus, the trial Court did not abuse its discretion in evaluating the evidence presented and the Fifth Circuit correctly so held. *See, Davis* v. *Bd. of School Commissioners,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976) (review limited to determining whether trial Court's evaluation of evidence amounted to abuse of discretion).

POINT III

The Fact That the Trial Judge Questioned the Witnesses on the Stand During the Trial to Test Their Credibility Provides No Grounds for Alleging Bias.

Both the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit properly ruled that a trial Judge's objective findings that witnesses lacked credibility affords no basis for the conclusion such a Judge was biased and prejudiced.

As a supplementary reason for certiorari, petitioner asserts that Judge Schwartz's trial demeanor denied petitioner an impartial trial. (Petition, p. 14). In particular, petitioner contends that Judge Schwartz "participated extensively in cross-examination and conducted himself in a manner . . . which gave a strong appearance of bias . . ." (Petition, p. 5).

This Court has held that alleged bias and prejudice, claimed to disqualify a Judge, must stem from an extrajudicial source. *U.S.* v. *Grinnell Corp.*, 384 U.S. 563 (1966). And rulings and findings made by a Judge in the course of a judicial proceeding do not justify a finding that the Judge has a personal bias or prejudice for or against a party. *Curl* v. *I.B.M.*, 517 F.2d 212 (5th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). *See U.S.* v. *English*, 501 F.2d 1254 (7th Cir. 1974), *cert. denied, Hubbard* v. *U.S.*, 419 U.S. 1114 (1975).

As recently as this February, the United States Court of Appeals for the Second Circuit was presented with a claim that adverse rulings and a Judge's treatment of a party's witnesses can create an appearance of bias under subsection 455(a). *IBM* v. *U.S.*, —— F.2d —— (2d Cir. 1980). The

Court rejected this contention. Regarding adverse rulings the Court said that "a trial Judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias." As to conduct toward witnesses, the Court held that when a Judge acts as fact-finder, it is his duty to form judgments as to witnesses' veracity. The role of Judge as fact-finder, the Court said, was succinctly stated by Judge Frank in *In re J. P. Linahan Inc.*, 138 F.2d 650 (2d Cir. 1943):

> ". . . because his fact-finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is his duty, while listening to and watching them, to form attitudes towards them. He must do his best to ascertain their motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. He must also shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not make child-like innocence. If the judge did not form judgments of the actors in those courthouse dramas called trials, he could never render decisions."

CONCLUSION

The Court below correctly applied the proper legal standards, and correctly determined on the facts that there was no bias, or appearance of bias which could justify asking the Judge to recuse himself.

The petition should be denied.

Respectfully submitted,

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Certificate of Service

Undersigned counsel for Respondent certifies that on this eleventh day of July, 1980, three (3) copies of this Brief in Opposition of a Petition for Writ of Certiorari were deposited in a United States Post Office with First-Class Postage prepaid in accordance with the Rules of this Court addressed to Evangeline M. Vavrick, counsel for Petitioner, Chester Kain at her post office address:

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I certify that by such service all parties required to be served have been served.

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July 11, 1980

Appendix

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

No. 74-2823

SECTION "F"

CHESTER KAIN

VS.

S/S VJAZMA
THE BALTIC SHIPPING CO.

Transcript of Motion heard in open court on September 7, 1977, before the HONORABLE CHARLES SCHWARTZ, JR., District Judge presiding.

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REPORTED BY:

Julianne W. Andressen, C.S.R., R.P.R.
Official Court Reporter
Section "A"
United States District Court

* * * *

Since your allegations are still before me in connection with the Motion for a New Trial, and this refers not to the Intervener's allegations but to Plaintiff's allegations, I note that in her motion Plaintiff states that the case was not tried by—in her allegations refer to the fact that the case was not tried by a jury; has stated this Court quote "volunteered to try this case." Whether or not anything more is to be connotated by the use of the word volunteer or not the Court has no way of knowing. However, the facts are as follows:

This Judge and Judge Mitchell and other Judges were having lunch, at which time Judge Mitchell asked if anyone had some time available, as he was in a jam with two cases ready to be tried on the same day. He wanted another Judge to try a collision case involving Russian seamen, and explained that a great deal of the testimony would have to be accomplished through an interpreter. As is the custom in this Court when a Judge is not engaged in trial and another Judge has two cases that are ready for trial on the same day, in the interest of judicial time tries a case for another Judge. This is how this matter was tried before this Court.

* * * *

Insofar as the allegations are in the record concerning my relationship with Mr. William E. Wright, Jr., who is the son of Mr. William E. Wright, Sr., Mr. William E.

Wright, Jr. was an associate in my law firm. I hired Mr. William E. Wright, Jr. without having to ever consult or having a conversation with Mr. William Wright, Sr. I have never had a social engagement, a social relationship, or any kind of relationship with Mr. William Wright, Sr. during the entire time that I have practiced law. I think I am correct, I don't know if he was in my law class, but we were in law school at the same time. I have never had a case in which I have been associated with Mr. William Wright, Sr., nor do I ever recall having a case in contest with Mr. Wright, Sr. in some thirty years before this Bar. So, as to the allegations and the reference that there may have been some relationship between Mr. William Wright, Sr. and this Court they are utterly false and without merit.

• • • •